

Privy Council Appeal No. 153 of 1915.

Maung Shwe Goh - - - - - *Appellant,*

v.

Maung Inn and others - - - - - *Respondents,*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER, 1916.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD WRENBURY.
MR. AMEER ALI.

[*Delivered by the LORD CHANCELLOR.*]

This appeal is a step—and their Lordships hope the last step—in litigation, which was commenced on the 17th August, 1906, by the present appellant, who claimed against one George William Davis specific performance of a contract dated the 4th April, 1906, for the sale of some 19,318 acres of land situate in the Pegu district, Lower Burma. The question raised depends on the true construction of this contract, but in order to understand its meaning it is necessary to consider some antecedent facts.

On the 30th September, 1905, a formal mortgage of the property, which subsequently became the subject of the contract, was executed by the defendant Davis in favour of the appellant to secure the repayment of 50,000 rupees on the 30th December, 1905, together with interest at the rate of 8 annas per cent. per month, and also interest thereafter at the current bank rate of interest in Rangoon. It appears from the mortgage that it was really given as security for the payment of 50,000 rupees, the amount of 5 hundis which had been drawn by the mortgagor upon the mortgagee and negotiated by the mortgagor with the bank at Bengal. The mortgage contained a formal conveyance of real property and a covenant, the effect of which has already been mentioned. It also contained a further and independent covenant that if the sum of 50,000 rupees should not be paid when it was due, the mortgagor would pay interest thereon at 8 annas per cent. per month, and

also interest on the 50,000 rupees at the current bank rate until the principal should be duly paid. The hundis were not met by the mortgagor at the due date, and were renewed until the 4th April, 1906, on which date the mortgagor, not being in a position to pay the money, wrote to the plaintiff a letter in the following terms:—

“My dear Maung Shwe Goh,

“I write this to inform you that as I have not got the interest due on 50,000 rupees ready now I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July, 1906, I agree the whole land being sold to you for 1 lakh rupees (100,000 rupees). After deducting out of this amount 50,000 rupees already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally.”

The request was acceded to by the plaintiff, and the contract thus made is the contract in question.

The money was not paid by the date fixed, and on the 6th July, 1906, the mortgagee paid to the Bank of Bengal the 50,000 rupees due on the hundis, and thus became entitled to whatever rights were conferred upon him by the agreement. The mortgagor refused to execute a conveyance of the property to the plaintiff, indeed he denied the authenticity of his signature to the contract, and thus compelled the plaintiff to institute the proceedings out of which this appeal has arisen.

The learned Judge by whom the suit was heard dismissed it on the 18th February, 1908, but this judgment was reversed by the Chief Court of Lower Burma, and by their order of the 11th May, 1909, specific performance of the agreement contained in the letter of the 4th April, 1906, was ordered against the mortgagor, and this order was affirmed on appeal by this Board on the 5th July, 1911.

The defendant Davis died on the 14th August, 1911, and the first respondent to this appeal is his legal representative. The other respondents represent mortgagees from Davis under mortgages executed subsequently to that in favour of the plaintiff.

The appellant entered into possession of the property on the 24th March, 1911, but it does not appear that even up to the present time a proper conveyance of the equity of redemption has ever been executed in his favour, an order obtained from the Court on the 25th January, 1910, directing such conveyance to be executed on behalf of Davis by the Assistant Registrar, having been set aside upon the grounds that proper notice of the application had not been served upon Davis.

The present appeal arises out of an application which is in form for execution of the judgment for specific performance, and the question involved affects only the manner in which the purchase-money payable under the contract for sale ought to be calculated. On the part of the appellant, it is contended

that interest continued to run upon his mortgage until the date when he entered into possession, that consequently the principal sum of 50,000 rupees, together with the agreed interest up to that date, ought to be deducted from the 100,000 rupees, which was the purchase price, and the balance only should be paid by him. This view was accepted by the Registrar and his decision was upheld by the Judge of the Chief Court, but was reversed by the Appellate Court, who decided that the appellant was only entitled to bring into account the amount due for principal and interest up to the 6th July, 1906. The foundation of this judgment depends upon the application to the contract of the 4th April, 1906, of the well-known rule by which the rights of vendors and purchasers of real estate are regulated in this country. In the English Courts, a contract for sale of real property makes the purchaser the owner in equity of the estate, and from this principle it follows that, where the rights as to payment of interest on the purchase-money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take, or could safely have taken, possession; and interest on the purchase-money runs in favour of the vendor from that time. It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by section 54 of the Transfer of Property Act, 1882 (a statute made applicable to Lower Burma), it is expressly provided that such a contract creates no interest in or charge upon the land. If, therefore, the contract was silent in dealing with the question of interest, their Lordships think that the appellant would have strong ground for contending that the reasoning in the Court of Appeal could not be supported. It is an unfortunate fact that this argument never appears to have been raised at any earlier stage of these proceedings; and their Lordships have not, therefore, the advantage of the opinion of the learned Judges of the Appellate Division upon this point. But the matter need not be pursued because, in their Lordships' opinion, apart altogether from this consideration, upon the true construction of the contract the appellant must succeed. At the date when the contract was executed a valid legal mortgage was on foot, containing an express covenant for payment of the 50,000 rupees and interest until the debt was discharged. The money was due when the contract was made, and the contract opens with the request for three months' further time for payment of the "interest due thereon." In this connection, it is clear that the "interest due thereon" is the interest payable under the mortgage deed up to the time, whatever it may be, on or before the 6th July, 1906, when the 50,000 rupees might be paid. On failing to pay at the date, the agreement became operative for sale of the land, and the final words, in their

Lordships' view, which provided for deduction from the purchase price of the 50,000 rupees "and all interest due thereon," means that this deduction should be made at the time when the balance is to be paid, and this would be the completion of the contract. The mere fact that the phrase "interest due thereon" occurs twice in the contract does not involve the conclusion that the date up to which interest is to be calculated is the same on both occasions, but when once it is accepted that the dates are different all difficulty disappears, since it then follows that interest is by agreement continuing to run on the principal money. This interest is that reserved under the mortgage deed, and it must continue to run until the debt is discharged, which can only be when the balance is struck and paid. If, therefore, possession had not been taken by the purchaser, and no default could be attributed to him, the interest would have gone on until the transfer was executed, but it appears that he has been put into possession under the contract, and of course he could not both retain the rents and receive the interest. The order therefore of the Registrar was quite right in allowing interest up to, but not beyond, the date when he took possession.

Counsel for the respondents has urged that, by virtue of the contract, the mortgage was ended, since a mortgagee, who has contracted to buy the equity of redemption, stands in the position of a purchaser, which is inconsistent with that of a mortgagee. But, whatever might result from such argument, where the rights of the parties were entirely untouched by the terms of the contract, such consideration cannot apply where the contract has itself provided what the rights are to be. This, in their Lordships' opinion, is what the contract did, and they therefore think that the appeal succeeds.

The order appealed from must therefore be reversed with costs here and below, and the order of the Judge of first instance restored. The respondents will repay any costs paid to them by the appellant. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

MAUNG SHWE GOH

v.

MAUNG INN AND OTHERS.

DELIVERED BY

THE LORD CHANCELLOR